

Intelligence Identities Protection Act

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Summary

Concern that government documents obtained by WikiLeaks and disclosed to several newspapers could reveal the identities of United States intelligence agents or informants focused attention on whether the disclosure or publication of such information could give rise to criminal liability. This report summarizes the Intelligence Identities Protection Act (IIPA; P.L. 97-200), enacted by Congress in 1982 to address the unauthorized disclosure of information that exposes covert U.S. intelligence agents. The act, as amended, is codified at 50 U.S.C. Sections 421-426, and provides criminal penalties in certain circumstances for intentional, unauthorized disclosure of information identifying a covert agent, where those making such a disclosure know that the information disclosed identifies the covert agent as such and that the United States is taking affirmative measures to conceal the covert agent's foreign intelligence relationship to the United States. The act prescribes punishments for disclosing the identities of covert agents with increasing severity according to the level of access to classified information the offender exploited. Offenders without authorized access to classified information are subject to punishment only if they participated in a pattern of activity designed to discover and reveal the identities of covert agents and have reason to believe that such disclosure will harm U.S. intelligence operations.

The act also provides exceptions and defenses to prosecution, makes provision for extraterritorial application for offenders who are U.S. citizens or permanent resident aliens, includes reporting requirements to Congress, and sets forth definitions of the terms used in the act. Prosecutions are rare, despite some high-profile incidents involving the exposure of U.S. intelligence agents. Although some officials have expressed concern that the WikiLeaks disclosures could endanger the lives of persons who provided information to assist U.S. forces in Iraq or Afghanistan or to embassy officials, no prosecutions appear to have occurred related to those disclosures. There was, however, one prosecution brought related to the revelation of the identities of CIA interrogators. The 111th Congress increased the penalties for violations by persons with access to classified information (P.L. 111-259).

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The act also provides exceptions and defenses to prosecution, makes provision for extraterritorial application of the law if the offender is a U.S. citizen or permanent resident alien, includes reporting requirements to Congress, and sets forth definitions of the terms used in the act. Prosecutions under this act have been rare, despite some high-profile incidents involving the exposure of U.S. intelligence agents. Although some officials have expressed concern that the WikiLeaks disclosures could endanger the lives of persons who provided information to assist U.S. forces in Iraq or Afghanistan or to embassy officials,¹ no prosecutions appear to have resulted. There was, however, one prosecution brought related to the revelation of the identities of

¹ With respect to the Afghan documents, see Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, on *Meet the Press*, August 1, 2010, transcript available at http://www.msnbc.msn.com/id/38487969/ns/meet_the_press-transcripts/; Elisabeth Bumiller, *Gates Found Cost of Leaks Was Limited*, NY TIMES, October 17, 2010 (quoting letter from Defense Secretary Robert M. Gates to Senator Levin from Secretary Gates stating that the release of Afghan informants’ names could have “potentially dramatic and grievously harmful consequences”). The documents relating to the Iraq war have reportedly been redacted to withhold the names of informants. See Anna Mulrine, *Wikileaks Iraq Documents not as Damaging as Pentagon Feared—Yet*, CHRISTIAN SCIENCE MONITOR, October 25, 2010. After the release of classified State Department cables began in November 2010, State Department officials likewise predicted that lives would be jeopardized. Tony Capaccio, *Pentagon Alerts House, Senate Panels to New Classified WikiLeaks Release*, BLOOMBERG, November 24, 2010, <http://www.bloomberg.com/news/2010-11-24/pentagon-warns-house-senate-defense-panels-of-more-wikileaks-documents.html> (quoting Assistant Secretary for Legislative Affairs Elizabeth King). Secretary of State Clinton explained that

Relations between governments aren’t the only concern created by the publication of this material. U.S. diplomats meet with local human rights workers, journalists, religious leaders, and others outside of governments who offer their own candid insights. These conversations also depend on trust and confidence. For example, if an anti-corruption activist shares information about official misconduct, or a social worker passes along documentation of sexual violence, revealing that person’s identity could have serious repercussions: imprisonment, torture, even death.

Remarks to the Press on the Release of Confidential Documents, November 29, 2010, available at <http://www.state.gov/secretary/rm/2010/11/152078.htm>. Although the cables were reportedly being released in redacted form to protect identities as deemed necessary by the newspapers, the State Department warned human rights activists, foreign government officials and businesspeople who were identified in the diplomatic cables that they may be at risk. See Mark Landler and Scott Shane, *U.S. Sends Warning to People Named in Cable Leaks*, N.Y. TIMES, January 6, 2011.

CRS is not aware of any information to suggest that the WikiLeaks disclosures or publication of leaked information by newspapers has resulted in the exposure of any covert agents as defined by this statute. For background related to the WikiLeaks disclosures and information about other criminal prohibitions that may be implicated, see CRS Report RL33502, *Protection of National Security Information*, by Jennifer K. Elsea.

CIA interrogators.² The 111th Congress increased the penalties for violations by persons with access to classified information (P.L. 111-259).³

Background

The Intelligence Identities Protection Act was enacted into law as an amendment to the National Security Act of 1947 in response to concerns of members of the House and Senate Intelligence Committees and others in Congress “about the systematic effort by a small group of Americans, including some former intelligence agency employees, to disclose the names of covert intelligence agents.”⁴ The Senate Judiciary Committee’s report also discussed the efforts of Philip Agee, Lewis Wolf, and others to identify and disclose U.S. intelligence officers as part of “a systematic effort to destroy the ability of [U.S.] intelligence agencies to operate clandestinely,” and their apparent repercussions.⁵ Such disclosures preceded and may have contributed to circumstances resulting in the death or attempted assassination of some Central Intelligence Agency (CIA) officers, expulsion of others from a foreign country following charges of spying, and impairment of relations with foreign intelligence sources. Two of Agee’s books revealed over 1,000 names of alleged CIA officers. Wolf was co-editor of the “Covert Action Information Bulletin,” a publication which contained a section entitled “Naming Names.” Wolf claimed to have revealed the names of over 2,000 CIA officers. He also provided addresses, phone numbers, license tag numbers, and colors of the automobiles of some alleged intelligence agents.⁶ These disclosures set the stage for the consideration and passage of the Intelligence Identities Protection Act.

The Intelligence Identities Protection Act

The Intelligence Identities Protection Act provides criminal penalties for the intentional, unauthorized disclosure of information identifying a covert agent with knowledge that the information identifies a covert agent as such and that the United States is taking affirmative measures to conceal the covert agent’s foreign intelligence relationship to the United States. Covert agents include officers and employees of a U.S. intelligence agency⁷ (including military officers assigned to an intelligence agency) whose identities as such are classified and who are

² See Charlie Savage, *Former C.I.A. Operative Pleads Guilty in Leak of Colleague’s Name*, N.Y. TIMES, October 23, 2012, available at <http://www.nytimes.com/2012/10/24/us/former-cia-officer-pleads-guilty-in-leak-case.html>.

³ Section 363 of P.L. 111-259, The Intelligence Authorization Act for FY2010, also amended the IIPA to require as part of the annual report on its use an assessment “of the need, if any, for modification of this title for the purpose of improving legal protections for covert agents.”

⁴ S.Rept. 97-201, at 1, *reprinted in* 1982 U.S.C.C.A.N. 145. In this report, the Senate Judiciary Committee reviewed the legislative history of S. 391 and the companion bill, H.R. 4, and their predecessors beginning with proposals in the 94th and 95th Congresses. The Congress passed H.R. 4, in lieu of the Senate bill, after amending the House bill to encompass much of the language of the Senate bill.

⁵ S.Rept. 97-201, at 1-7, *reprinted in* 1982 U.S.C.C.A.N. at 145-51. S.Rept. 97-201, 7-10, *reprinted in* 1982 U.S.C.C.A.N. at 151-54. *See also*, H.R. 4, *The Intelligence Identities Protection Act: Hearings before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 97th Cong., 1st Sess. (1981); *Intelligence Identities Protection Act of 1981—S. 391: Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

⁶ S.Rept. 97-201, at 7-10, *reprinted in* 1982 U.S.C.C.A.N. at 151-54.

⁷ “Intelligence agency” is defined to mean “the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.” 50 U.S.C. §426(5).

serving (or have served within the last five years) outside the United States; as well as a U.S. citizen residing abroad (or working for certain FBI components within the United States) or a foreign national anywhere, who acts as an informant,⁸ agent, or source to an intelligence agency, and whose relationship with the U.S. government is classified.⁹ The act prescribes punishments for disclosing the identities of covert agents with increasing severity according to the level of access to classified information the offender exploited. Offenders without authorized access to classified information are subject to punishment only if they participated in a pattern of activity designed to discover and reveal the identities of covert agents and have reason to believe that such disclosure will harm U.S. intelligence operations.

Prohibitions

The criminal provisions of the act are contained in 50 U.S.C. Section 421, which defines three offenses according to the offender's means of acquiring the information at issue:

§ 421. Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

(a) Disclosure of information by persons having or having had access to classified information that identifies covert agent

Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than 15 years, or both.

(b) Disclosure of information by persons who learn identify of covert agents as result of having access to classified information

Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than ten years, or both.

(c) Disclosure of information by persons in course of pattern of activities intended to identify and expose covert agents

Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than three years, or both.

⁸ "Informant" is defined to mean "any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure." 50 U.S.C. §426(6).

⁹ 50 U.S.C. §426(4). In the case of a foreign national, the statute specifies that both "past or present" intelligence roles are covered, whereas U.S. citizens are included in the definition only if they are currently acting in an intelligence capacity. The full statutory language is set forth *infra* at footnote 13.

Each of these offenses is a felony. The applicable maximum fine is \$250,000, unless any pecuniary gain or loss resulted from the offense, in which case the fine may be set at twice the amount of loss or gain.¹⁰ A sentence under Section 421 is to be served consecutively with respect to any other prison sentence.¹¹

The offenses set forth in 50 U.S.C. Section 421 (a), (b), and (c) share some elements in common: (1) intentional disclosure¹² of the identity of a covert agent¹³ (2) to someone not authorized to receive classified information, (3) knowing that the information disclosed identifies that agent, and (4) knowing further that the United States is taking affirmative measures to conceal the agent's intelligence relationship with the United States.

Subsections 421(a) and (b) contemplate offenses where the perpetrator has or has had authorized access to classified information, while subsection 421(c) has no similar requirement. Subsection 421(a) applies to an offender who has or previously had access to classified information that identifies a covert agent. Subsection 421(b) applies to an offender who learns the identity of a covert agent as a result of having authorized access to classified information in general. In contrast to these provisions, subsection 421(c) does not require that the perpetrator ever had authorized access to classified information. Rather, it applies if the perpetrator discloses the identity of any covert agent (1) in the course of a pattern of activities intended to identify and expose covert agents, (2) with reason to believe that these activities would impair or impede U.S. foreign intelligence activities.¹⁴ Subsection 426(10) defines a "pattern of activities" as involving "a series of acts with a common purpose or objective."

Section 424 establishes extraterritorial jurisdiction for offenses committed overseas only where the offender is a U.S. citizen or a permanent resident alien.

Under 50 U.S.C. Section 422, it is a defense to a prosecution under 50 U.S.C. Section 421 that, prior to the commission of the offense, the United States publicly acknowledged or revealed the

¹⁰ 18 U.S.C. §3571.

¹¹ 50 U.S.C. §421(d).

¹² 50 U.S.C. §426 (3) defines "disclose" to mean "to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available."

¹³ 50 U.S.C. §426(4) defines "covert agent" to mean

(A) a present or retired officer or employee of an intelligence agency or a present or retired member of the armed forces assigned to duty with an intelligence agency—

(i) whose identity as such an officer, employee, or member is classified information, and
(ii) who is serving outside the United States or has within the last five years served outside the United States; or

(B) a United States citizen whose intelligence relationship to the United States is classified information, and—

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or
(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

¹⁴ "Foreign intelligence activities" is not defined. It is unclear whether counterintelligence and counterterrorism activities are included, although counterintelligence and counterterrorism components of the FBI (but not the Department of Defense) qualify as intelligence agencies whose agents' identities are protected.

intelligence relationship to the United States of the covert agent involved. In addition, this provision precludes prosecution of anyone other than the person who made the disclosure of the identity of a covert agent for a Section 421 offense on the grounds of misprision of felony, aiding and abetting, or conspiracy, unless the elements of subsection 421(c) are satisfied. This would appear to preclude the prosecution of a recipient of covered information, whether solicited or not, who publishes the information but has not engaged in a prohibited “pattern of activities” intended to disclose the names of covert agents. It is not an offense for a person to transmit information directly to either the House or Senate intelligence committees, nor for a covert agent to disclose his or her own identity. Under Section 425, the act is not to be construed to permit the withholding of information from Congress or a committee of the House or Senate.

First Amendment Implications

During Congress’s consideration of the measure, much attention was focused on subsection 421(c) and the First Amendment implications if it were employed to prosecute a journalist or anyone else who might publish the identities of covert agents learned from public sources or through other lawful activity.¹⁵ The Senate Judiciary and the Conference Committee addressed these concerns at length. Both concluded that the language of the measure would pass constitutional muster.¹⁶ The Conference Committee characterized the goal of the provision as follows:

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of covert agents’ identities in such a course designed, first, to make an effort at identifying covert agents and, second, to expose such agents publicly. The gratuitous listing of agents’ names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to identify U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly ... serves no legitimate purpose. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy....

The standard adopted in section [421(c)] applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization’s enforcement of its internal rules.¹⁷

The Conference Committee distinguished between the main purpose of a person engaged in “the business of ‘naming names,’” whose intent is to identify and expose covert agents, and side effects of one’s conduct that one “anticipates but allows to occur.” “Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.”¹⁸

¹⁵ H. Conf. Rep. 97-580, at 6-8; *reprinted in* 1982 U.S.C.C.A.N., at 170-72.

¹⁶ S.Rept. 97-201, at 14-18; *reprinted in* 1982 U.S.C.C.A.N., at 158-62; H. Conf. Rep. 97-580, at 7-10; *reprinted in* 1982 U.S.C.C.A.N., at 171-75.

¹⁷ H. Conf. Rep. 97-580, at 7-8; *reprinted in* 1982 U.S.C.C.A.N., at 171-72.

¹⁸ H. Conf. Rep. 97-580, at 9-10; *reprinted in* 1982 U.S.C.C.A.N., at 173-74.

Despite these assurances, some commentators have questioned the constitutional sufficiency of subsection 421(c) on First Amendment grounds, finding it overbroad, and questioning the absence of a specific intent requirement instead of the “reason to believe” standard.¹⁹ The courts have yet to consider the issue.

Reporting Requirements

Section 423 requires the President, after receiving information from the Director of Intelligence, to report to the House and Senate intelligence committees annually on measures to protect covert agents, and other relevant information. Such reports are exempt from any publication or disclosure requirement.

Relevant Cases

To date, there have been no reported cases interpreting the statute, but it did result in two convictions pursuant to guilty pleas. In 1985, Sharon Scranage, a former CIA clerk, pleaded guilty²⁰ for providing classified information regarding U.S. intelligence operations in Ghana to a Ghanaian agent with whom she was romantically involved.²¹ She was initially sentenced to five years in prison, but a federal judge reduced her sentence to two years in light of the relatively lenient treatment received by the Ghanaian agent, who was sentenced to 20 years after pleading no contest to espionage but was soon thereafter returned to Ghana as part of a spy exchange.²²

In 2012, a former CIA officer pleaded guilty to one count of violating the IIPA for having given the names of two covert agents to two journalists.²³ The defendant, John Kiriakou, was initially charged under the Espionage Act, 18 U.S.C. Section 793, as well, but these charges were dropped as part of the plea agreement. He was sentenced to 30 months in prison.²⁴ The disclosures came to light after defense counsel for certain high-value detainees at the U.S. Naval Station in Guantanamo Bay, Cuba, filed classified papers in connection with military commission trials that included photographs of the agents.²⁵ Investigators concluded that the detainees’ defense team had not violated any statute.

Other spies whose crimes are known to have resulted in the deaths of covert agents were charged with more serious offenses under the Espionage Act, 18 U.S.C. Section 794, but not under the Intelligence Identities Protection Act. Aldrich Ames, whose activities resulted in the executions of

¹⁹ See Note: *The Constitutionality of the Intelligence Identities Protection Act*, 83 COLUM. L. REV. 727 (1983); Note: *The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c)*, 49 BROOKLYN L. REV. 479 (1983).

²⁰ See Richard B. Schmitt, *Rare Statute Figures in Rove Case*, LA TIMES, July 15, 2005, at A15 (reporting 1985 conviction of Sharon Scranage, a clerk for the CIA in Ghana, for disclosing identities of covert agents).

²¹ Stephen Engelberg, *C.I.A. Clerk and Ghanaian Charged in Espionage Case*, NY TIMES, July 12, 1985, at A13.

²² *Spying Sentence Reduced*, NY TIMES, April 11, 1986, at A15.

²³ Press Release, U.S. Attorney for the Eastern District of Virginia, “Former CIA Officer John Kirakou Pleads Guilty to Disclosing Classified Information About CIA Officer,” October 23, 2012, available at <http://www.fbi.gov/washingtondc/press-releases/2012/former-cia-officer-john-kirakou-pleads-guilty-to-disclosing-classified-information-about-cia-officer>.

²⁴ Justin Jouvenal, *Former CIA officer John Kiriakou is sentenced to 30 months in prison for leaks*, WASH. POST, January 25, 2013.

²⁵ Press Release, U.S. Department of Justice, “Former CIA Officer John Kiriakou Charged with Disclosing Covert Officer’s Identity,” January 23, 2012, available at <http://www.justice.gov/opa/pr/2012/January/12-ag-083.html>.

10 Soviet sources to the FBI and CIA,²⁶ pleaded guilty to espionage and was sentenced to life imprisonment. Robert Hanssen, whose work as an FBI “mole” for the Soviet and later Russian security services resulted in the deaths of at least three covert agents,²⁷ pleaded guilty in 2001 to multiple counts of espionage and likewise received a life sentence.

In 2003, the Department of Justice opened an investigation to determine whether a violation of the Intelligence Identities Protection Act had occurred after syndicated columnist Robert Novak published the name of CIA officer Valerie Plame.²⁸ No charges under Section 421 were pursued;²⁹ however, the existence of the provision and its possible breach were held to overcome any privilege on the part of reporters to refuse to disclose their source to a grand jury.³⁰ I. Lewis Libby, then Vice President Dick Cheney’s chief of staff, was convicted of obstruction of justice, perjury, and making a false statement to federal investigators in connection with the incident, and was sentenced to 30 months’ imprisonment, two years’ probation, and a \$250,000 fine. President George W. Bush commuted the prison portion of the sentence after Mr. Libby was denied release on bond pending his appeal.³¹

In a related case, the U.S. Court of Appeals for the D.C. Circuit interpreted the statute as neither providing for nor precluding a remedy for a covert agent whose identity is disclosed by a government employee, but as counseling against the creation of a *Bivens*³² remedy for such an agent because permitting a lawsuit “would inevitably require an inquiry into ‘classified information that may undermine ongoing covert operations.’”³³

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²⁶ Assessment of the Aldrich H. Ames Espionage Case and Its Implications for U.S. Intelligence, S.Prt. 103-90 at 53 (1994).

²⁷ U.S. Department of Justice, Office of the Inspector General, *Review of the FBI’s Performance in Detering, Detecting, and Investigating Espionage Activities of Robert Hanssen* (Unclassified Executive Summary) 9 (2003), available at http://files.findlaw.com/docviewer/viewer_news.html#http://news.findlaw.com/hdocs/docs/hanssen/hanssen81403rpt.pdf.

²⁸ See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1143 (D.C. Cir. 2005) (recounting background of the investigation into the leak of Valerie Plame’s identity as an officer of the CIA).

²⁹ It has been speculated that a Section 421 offense was not charged because Ms. Plame was not a “covert agent” within the meaning of the act or that the government officials who revealed her identity to reporters did not know that her status as a CIA officer was classified. See William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1490-1501 (2007).

³⁰ *Id.*, cert. denied 545 U.S. 1150 (2005).

³¹ See *The President’s Statement*, NY TIMES, July 3, 2007, at A15. Mr. Libby later dropped his appeal. Philip Shenon, *Libby Drops His Appeal In Leak Case*, NY TIMES, December 11, 2007 at A27.

³² *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, (1971) (creating a private right of action for a violation of constitutional rights by agents of the government).

³³ *Wilson v. Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008), cert. denied 129 S.Ct. 2825 (2009).

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